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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
8
9 THERESE C. MASSON,) Case No. 12-05335 SC
10 Plaintiff,)
11 v.) ORDER GRANTING MOTION TO
12 SELENE FINANCE LP, et al.,) DISMISS
13 Defendants.)
14 _____)

15 I. INTRODUCTION

16 Plaintiff Therese C. Masson ("Plaintiff") brings this action
17 in connection with the foreclosure and sale of her property. Now
18 before the Court is a Rule 12(b)(6) motion to dismiss the action
19 brought by Defendants Selene Finance, LP ("Selene"), SRMOF 2009-1
20 Trust; Selene RMOF REO Acquisition LLC, U.S. Bank Trust National
21 Association, and Selene RMOF LLC (collectively, "Defendants"). ECF
22 No. 11 ("Mot."). The Motion is fully briefed, ECF Nos. 17
23 ("Opp'n"), 18 ("Reply"), and appropriate for determination without
24 oral argument. For the reasons set forth below, the Motion is
25 GRANTED and Plaintiff is granted leave to amend.

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1 **II. BACKGROUND**

2 Plaintiff alleges that she is the owner of real property
3 located on Oakland Avenue in Oakland, California ("the Property").
4 ECF No. 1 (Notice of Removal ("NOR")) Ex. 1 ("Compl."). A deed of
5 trust recorded in Alameda County indicates that Plaintiff obtained
6 an \$875,000 loan from Option One Mortgage Corporation in 2006 that
7 was secured by a deed of trust on the Property. ECF No. 12
8 (Request for Judicial Notice ("RJN")) Ex. 1.¹ Plaintiff alleges
9 that she borrowed money from Defendants' predecessor-in-interest in
10 order to use the Property, a duplex, "as a live-work property for
11 retirement, or as an investment rental property to support
12 Plaintiff's retirement." Compl. ¶ 12. On April 22, 2010, a notice
13 of default was recorded against the Property, and on August 31,
14 2012, a notice of trustee's sale was recorded. RJN Exs. 8, 10.
15 The trustee's sale was initially set for September 26, 2012, but
16 was later postponed to October 30, 2012 and then postponed again to
17 November 30, 2012. See Opp'n at 2.

18 Plaintiff filed the instant action in state court on September
19 25, 2012 -- one day before the originally scheduled trustee's sale.
20 The Complaint asserts two causes of action: (1) violation of
21 California Civil Code section 2923.5 and (2) violation of the Fair
22 Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692g. Compl.

23 ¹ Plaintiff's objections to Defendants' RJN are OVERRULED and the
24 Court takes judicial notice of the deed of trust and the other
25 publicly filed documents attached to the RJN, but not the truth of
26 the matters asserted by those documents. Pursuant to Federal Rule
27 of Evidence 201, the Court may take judicial notice of "a fact that
28 is not subject to reasonable dispute" because, among other things,
it "can be accurately and readily determined from sources whose
accuracy cannot reasonably be questioned." Accordingly, the Court
"may properly take notice of public facts and public documents."
Cactus Corner, LLC v. U.S. Dept. of Agric., 346 F. Supp. 2d 1075,
1098 (E.D. Cal. 2004).

¶¶ 1-16. Plaintiff alleges that Defendants failed to comply with the notice requirements of section 2923.5, which allegedly requires that "lenders and/or servicers actively seek to help prevent foreclosures of residential properties by aiding homeowners with a review of their financial situations" Id. ¶ 6. Plaintiff further alleges that Defendants "engaged in unfair debt collection practices by scheduling a trustee sale on September 26, 2012, which it refused to postpone." Id. ¶ 9. As to the FDCPA, Plaintiff alleges that Defendants breached their obligations under 15 U.S.C. § 1692g by failing to provide Plaintiff with a "Debt Validation Notice" and by taking action contrary to Plaintiffs' rights under California Civil Code sections 2923.5 and 2923.6. Id. ¶ 15. Plaintiff prays for an injunction staying the trustee sale and damages, among other things.

The day after Plaintiff filed her complaint in state court, she moved for a temporary restraining order ("TRO"). NOR ¶ 1. The state court granted the TRO, setting a hearing on a preliminary injunction for October 18, 2012. Id. ¶ 2. On October 16, 2012, Defendants removed to federal court. On November 30, 2012 -- a few hours before the last scheduled trustee's sale -- Plaintiff filed an ex parte application for a TRO. ECF No. 15. The application was denied by this Court. ECF No. 16. Plaintiff avers that the trustee's sale then went forward as scheduled on November 30. See Opp'n at 3.

On November 16, 2012, two weeks prior to the trustee sale, Defendants moved to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

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1 **III. LEGAL STANDARD**

2 A motion to dismiss under Federal Rule of Civil Procedure
3 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
4 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
5 on the lack of a cognizable legal theory or the absence of
6 sufficient facts alleged under a cognizable legal theory."
7 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
8 1988). "When there are well-pleaded factual allegations, a court
9 should assume their veracity and then determine whether they
10 plausibly give rise to an entitlement to relief." Ashcroft v.
11 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court
12 must accept as true all of the allegations contained in a complaint
13 is inapplicable to legal conclusions. Threadbare recitals of the
14 elements of a cause of action, supported by mere conclusory
15 statements, do not suffice." Id. at 663. (citing Bell Atl. Corp.
16 v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
17 complaint must be both "sufficiently detailed to give fair notice
18 to the opposing party of the nature of the claim so that the party
19 may effectively defend against it" and "sufficiently plausible"
20 such that "it is not unfair to require the opposing party to be
21 subjected to the expense of discovery." Starr v. Baca, 633 F.3d
22 1191, 1204 (9th Cir. 2011).

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24 **IV. DISCUSSION**

25 Defendants move to dismiss on the grounds that (1) Plaintiff's
26 claims are barred by the doctrine of tender; (2) California Civil
27 Code section 2923.5 is inapplicable; and (3) foreclosing on a
28 property pursuant to a deed of trust is not a debt collection

1 within the meaning of the FDCPA. The Court addresses each of these
2 arguments below.

3 **A. Tender**

4 Defendants first argue that the Complaint cannot state a claim
5 because Plaintiff has not alleged that she is willing or able to
6 tender a sum sufficient to cure her default. Mot. at 3.
7 Defendants' argument is misplaced. As Defendants' own authority
8 states, an allegation of tender is generally only required where a
9 plaintiff seeks to cancel a voidable trustee sale. See FPCI RE-HAB
10 01 v. E & G Invs., Ltd., 207 Cal. App. 3d 1018, 1021 (Cal. Ct. App.
11 1989). Here, Plaintiff filed the Complaint and Defendants filed
12 their motion to dismiss prior to the trustee's sale, i.e., before
13 there was a voidable sale to cancel. Indeed, Plaintiff has yet to
14 formally request a cancellation of the trustee's sale. The
15 Complaint merely seeks a stay of the trustee's sale (which has
16 since occurred) and damages. Accordingly, the tender rule does not
17 bar Plaintiff's claims as pled.

18 **B. Civil Code Section 2923.5**

19 Defendants also argue that Plaintiff's claim under California
20 Civil Code section 2923.5 fails because the Property is not
21 Plaintiff's principal residence. Mot. at 4. Pursuant to Civil
22 Code section 2924.15(a), section 2923.5 only applies to "deeds of
23 trust that are secured by owner-occupied residential real property
24 containing no more than four dwelling units."² For the purposes of
25 section 2923.5, "'owner-occupied' means that the property is the
26 principal residence of the borrower and is security for a loan made

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28 ² Defendants mistakenly cite to Civil Code section 2923.5(h)(3)(i)
for the proposition that section 2923.5 only applies to owner-
occupied property. Mot. at 4. That subsection has been repealed.

1 for personal, family, or household purposes." Cal Civ. Code §
2 2924.15(a).

3 The Court concludes that section 2923.5 does not apply here
4 because, by Plaintiff's own admission, the Property is no longer
5 owner occupied. According to the Complaint, Plaintiff intended to
6 use the Property "as a live-work property for retirement, or as an
7 investment rental property to support . . . retirement." Compl. ¶
8 12. It is unclear what Plaintiff means by "live-work property,"
9 but the Property clearly would not be owner-occupied if it was
10 rented to another. In her opposition brief, Plaintiff confirms
11 that she does not currently live at the Property. Opp'n at 3.
12 However, she contends that it continues to serve as her "principal
13 residence" because she "lived in the property for a considerable
14 amount of time and has retained it as a primary residence for mail
15 contact and office residence, to date." Id. But the Property
16 could hardly be considered owner-occupied or a principal residence
17 if it is used only for business and mail-forwarding purposes.

18 Even if the Property were owner occupied, Plaintiff's claims
19 under section 2923.5 are now moot. The only remedy available under
20 section 2923.5 is the postponement of a foreclosure sale until the
21 requirements of the statute have been met. Shaterian v. Wells
22 Fargo Bank, N.A., 829 F. Supp. 2d 873, 886 (N.D. Cal. 2011)
23 (citing Mabry v. Super. Ct., 185 Cal. App. 4th 208, 213 (Cal. Ct.
24 App. 2010)). In this case, the foreclosure sale has already taken
25 place.

26 Accordingly, Plaintiff's claim for violation of Civil Code
27 section 2923.5 is DISMISSED WITH PREJUDICE.

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1 **C. FDCPA**

2 Finally, Defendants argue that Plaintiff's FDCPA claim fails
3 because foreclosing on a deed of trust does not qualify as debt
4 collection under the Act. Mot. at 6. To state a claim under the
5 FDCPA, a plaintiff must allege, among other things, "that the
6 defendant is a debt collector within the meaning of 15 U.S.C. §
7 1692a(6)." Geist v. OneWest Bank, C 10-1879 SI, 2010 WL 4117504,
8 at *2 (N.D. Cal. Oct. 19, 2010). Under 15 U.S.C. § 1692a(6), "the
9 term 'debt collector' means any person who uses any instrumentality
10 of interstate commerce or the mails in any business the principal
11 purpose of which is the collection of any debts, or who regularly
12 collects or attempts to collect, directly or indirectly, debts . . .
13 . ." This Court has previously held that "foreclosing on a
14 property pursuant to a deed of trust is not a debt collection
15 within the meaning of the . . . FDCPA." Gamboa v. Tr. Corps, 09-
16 0007 SC, 2009 WL 656285, at *4 (N.D. Cal. Mar. 12, 2009).

17 Plaintiff argues that the Court should defer to the Consumer
18 Financial Protection Bureau's (the "Bureau") position on the matter
19 since that agency is charged with enforcement of the FDCA. Opp'n
20 at 8. Specifically, Plaintiff points to an amicus brief filed by
21 the Bureau in the Eleventh Circuit in 2011, in which the agency
22 argued that an entity meeting the general definition of "debt
23 collector" under the FDCPA qualifies as a debt collector for the
24 purposes of the Act, even if its principal purpose is enforcing a
25 security interest. See ECF No. 17-7 ("Amicus Br.") at 14. Courts
26 will defer to a federal agency's interpretation of its own
27 regulations, advanced in a legal brief, unless that interpretation
28 is "plainly erroneous or inconsistent with the regulation." Chase

1 Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011). Further,
2 "considerable respect is due the interpretation given [a] statute
3 by the officers or agency charged with its administration." Ford
4 Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) (quotations
5 omitted).

6 Nevertheless, nothing in the Bureau's amicus brief suggests
7 that the FDCPA is applicable here. That brief concerned a case in
8 which the defendant, a loan servicer, allegedly called the
9 plaintiffs multiple times on a daily basis in an effort to collect
10 on the plaintiff's mortgage payments. Birster v. Am. Home Mortg.
11 Servicing, Inc., 481 F. App'x 579, 580-81 (11th Cir. 2012). The
12 defendant also sent the plaintiffs correspondence expressly stating
13 "THIS IS AN ATTEMPT TO COLLECT A DEBT." Id. at 580. In contrast,
14 there are no plausible allegations of debt collection here.
15 Plaintiff cryptically alleges that one of the defendants, Selene
16 Finance, "used the US Mail to solicit money from Plaintiff after
17 the default" Compl. ¶ 14. But the content of this
18 solicitation is not alleged.

19 In its amicus brief, the Bureau argued that a defendant that
20 engages in debt collection should not be exempt from the provisions
21 of the FDCPA merely because that defendant is also involved in a
22 foreclosure. See Amicus Br. at 8-10. However, the Bureau did not
23 argue that foreclosure, by itself, constitutes a debt collection
24 activity. In fact, the Bureau expressly declined to address that
25 issue:

26 Although the district court suggested that pursuing
27 foreclosure, by itself, cannot constitute debt
28 collection covered by the [FDCPA], the Court need not
 reach that question here. At a minimum, seeking

1 payment from a debtor unquestionably qualifies as debt
2 collection, even if it occurs in the context of
3 foreclosure proceedings. The [plaintiffs] allege that
4 [the defendant] repeatedly attempted to induce them to
5 pay amounts owed on their mortgage. That was debt
6 collection even though it occurred in the context of
7 foreclosure proceedings.

8 Id. at 12. In this case, Plaintiff has merely alleged that
9 Defendants engaged in foreclosure proceedings. Without more,
10 Plaintiff cannot state a claim under the FDCPA.

11 Accordingly, the Court DISMISSES Plaintiff's FDCPA claim with
12 leave to amend. Plaintiff's amended complaint should specifically
13 allege how Defendants engaged in debt collection activities and
14 clearly distinguish between the actions of each Defendant.

15 **v. CONCLUSION**

16 For the foregoing reasons, the Court GRANTS Defendants' motion
17 to dismiss. Plaintiff Therese C. Masson's first cause of action
18 for violation of California Civil Code section 2923.5 is DISMISSED
19 WITH PREJUDICE and her second cause of action for violation of the
20 FDCPA is DISMISSED WITH LEAVE TO AMEND. Plaintiff shall amend her
21 Complaint within thirty (30) days of the signature date of this
22 Order. Failure to do so may result in dismissal of this action
23 with prejudice.

24 IT IS SO ORDERED.

25 Dated: January 24, 2013



26 UNITED STATES DISTRICT JUDGE